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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FRED TUCKER, as Trustee, etc., Plaintiff and Appellant, v. PNC BANK, N.A., Defendant and Respondent.	B281921 (Los Angeles County Super. Ct. No. YC070538)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stuart M. Rice, Judge. Reversed and remanded with directions.

Keiter Appellate Law and Mitchell Keiter for Plaintiff and Appellant.

Wolfe & Wyman, Stuart B. Wolfe and Jeffrey S. Kaufman for Defendant and Respondent.

INTRODUCTION

Fred Tucker ("Tucker"), individually and as trustee of the Zula Tucker Living Trust, filed this action on April 17, 2015 for breach of written contract against PNC Bank, N.A. He appeals from the trial court's judgment of dismissal after an order sustaining PNC's demurrer without leave to amend.

Tucker argues the trial court erred in ruling he did not state a claim for breach of contract because (1) Tucker did not allege the existence of a contractual relationship with PNC, (2) Tucker did not allege he performed under the contract, and (3) the four-year statute of limitations barred his breach of contract cause of action. We agree with Tucker on (1), (2), and, in part, (3). We reverse the judgment and direct the trial court to give Tucker leave to amend to allege, if he can, a breach of contract cause of action based on breaches within four years of the commencement of this action.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Tucker, Successor in Interest to the Borrower, Alleges PNC, Successor in Interest to the Lender, Overcharged From 1988-1990*

According to the allegations of the third amended complaint, on January 21, 1988 Zula Tucker signed a $375,000 promissory note secured by a deed of trust on property in Palos Verdes Estates, California, payable to The Florida Group, Inc. The interest rate on the note was variable, starting at 8.375 percent and subject to change based on an index derived from the yields of various government securities. The note also stated the

interest rate "will never be greater than 14.375%." The deed of trust securing the promissory note stated that its terms "shall bind and benefit the successors and assigns" of the original parties.

In 2006 Tucker learned that PNC was "the successor in interest" of the note and deed of trust and that Quality Loan Service Corporation was the trustee and loan servicer for the loan. PNC and Quality Loan Service subsequently "accepted loan payments from [Tucker] for the Florida Group Promissory Note." Also in 2006 Zula Tucker "deeded all of her interests" in the Palos Verdes Estates property subject to the promissory note and deed of trust to the Zula Tucker Living Trust, a revocable living trust. The trust named Tucker as the trustee of the trust.

In September 2015 Tucker "conducted the first full audit of the payments that were made" on the note by Zula Tucker and her trust. Tucker discovered that "not all of the loan payments" by Zula Tucker "between 1988 and 1990 had . . . been fully credited by the Florida Group," PNC, and Quality Loan Service "against the loan in the approximate amount of $22,000.00" and that, "as a result of the failure to credit the payments, interest was overcharged by the defendants in the approximate amount of $159,261.00."

In April 2015 PNC and Quality Loan Service breached the terms of the note by recording a notice of default. The notice of default wrongfully stated that Tucker was delinquent on the loan payments in the amount of $39,314.51. Tucker alleged he "performed each and everything required to be performed pursuant to the terms of the promissory note, except those things which were excused by the defendants' breach."

B. *The Trial Court Sustains PNC's Demurrer Without Leave To Amend and Enters a Judgment of Dismissal*

The operative third amended complaint alleged one cause of action for breach of written contract. PNC demurred, arguing "there is no alleged contract between Fred Tucker, individually and as Trustee of the Zula Tucker Living Trust and PNC" because the promissory note was "signed by Zula Tucker individually." PNC also argued "Plaintiffs cannot state a cause of action for breach of contract because they cannot show that they performed or that their performance was excused." Finally, PNC argued the "cause of action for breach of written contract is barred by the applicable statute of limitation as Plaintiffs allege it relates to actions taken in 1988 to 1990." It does not appear counsel for Tucker filed an opposition, although both Tucker and his attorney appeared at the hearing on the demurrer.

The trial court sustained the demurrer without leave to amend. The trial court ruled that Tucker failed "to allege facts to demonstrate a contract between the parties and a breach of any purported contract" and that, because Tucker admitted "the borrower is in default," Tucker had failed to allege his performance or excuse for nonperformance. The court also ruled the applicable four-year statute of limitations barred Tucker's cause of action. Two weeks later, Tucker, now representing himself, filed a motion for reconsideration, which the trial court denied. Tucker timely appealed from the judgment of dismissal.

DISCUSSION

Tucker argues the trial court erred in ruling he did not have a contractual relationship with PNC because both parties to

the note, Zula Tucker and the Florida Group, assigned their respective interests to the parties in this action, Tucker as trustee of the trust and PNC as successor in interest to The Florida Group. Tucker points out the language of the deed of trust specifically states the "covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower." Tucker also argues he did not admit he had failed to perform under the contract; to the contrary, he claims he "overperformed" by overpaying on the promissory note. Finally, Tucker argued the four-year statute of limitations did not bar his breach of contract cause of action because his claim is actually one based on an open book account, where the statute of limitations does not begin to run until "the date of the last item." At a minimum, Tucker argues he can challenge overpayments during the four years preceding the filing of his lawsuit.

A. *Standard of Review*

On appeal from an order sustaining a demurrer without leave to amend, "we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 163.) "In reviewing a demurrer, we ask only whether the plaintiff has alleged—or could allege—sufficient facts to state a cause of action against the defendant." (*Id.* at p. 156.)

We review the trial court's denial of leave to amend for abuse of discretion. (*Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, 722.) To determine whether the plaintiff can cure a defect, "we consider whether there is a 'reasonable

possibility' that the defect in the complaint could be cured by amendment." (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1051.) "'If a demurrer was sustained without leave to amend, but the defect was curable by amendment, we would find an abuse of discretion in that ruling.'" (*D. Cummins Corp. v. United States Fidelity & Guaranty Co.* (2016) 246 Cal.App.4th 1484, 1489.)

B. *Tucker, as Trustee, Can Sue PNC for Breach of Contract*

"[T]he elements . . . for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) PNC argues Tucker did not allege the existence of a contractual relationship between Tucker and PNC.

But he did. Tucker alleged there was a contract, the promissory note secured by the deed of trust, between Zula Tucker and The Florida Group. He alleged that Zula assigned her interest in the note to the Zula Tucker Living Trust (although he used the less artful phrase "deeded all of her interests") and that The Florida Group assigned its interest in the note to PNC (although he used the less artful phrase "PNC is the successor in interest of" the note). An assignee of a contracting party can sue for breach of the contract. (*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 786.)[1] And the trustee of a

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[1] The note allows the lender to "require immediate payments in full of all sums secured" if the borrower sells or transfers all or any part of the property securing the note. Tucker did not allege, and PNC does not argue, The Florida Group or PNC ever

trust is the proper real party in interest to bring a cause of action on behalf of the trust. (*Wolf v. Mitchell, Silberberg & Knupp* (1999) 76 Cal.App.4th 1030, 1036; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 461.) Indeed, had Zula Tucker filed this action, PNC could have argued she did not have standing. (See *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.* (2011) 191 Cal.App.4th 1394, 1402 ["'[o]nce a claim has been assigned, the assignee is the owner and has the right to sue on it'"]; *Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1096 [assignor of contract lacks standing to sue on the contract]; *Botsford v. Haskins & Sells* (1978) 81 Cal.App.3d 780, 784 ["'[a]n assignor may not maintain an action upon a claim after making an absolute assignment of it to another; his right to demand performance is extinguished, the assignee acquiring such right'"].)

Tucker also alleged sufficient facts to sue PNC for breach of contract as The Florida Group's assignee. Tucker alleged PNC "accepted loan payments" from Tucker on the note from 2006 to 2015. "[A]n assignee's voluntary acceptance of the benefits of a contract may obligate the assignee to assume its obligations as a matter of law." (*Hearn Pacific Corp. v. Second Generation Roofing, Inc.* (2016) 247 Cal.App.4th 117, 136; see *Foreman Roofing Inc. v. United Union of Roofers etc. Workers* (1983) 144 Cal.App.3d 99, 107 ["[a]n assignment carries with it all rights of

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exercised this contractual right. In addition, any uncertainty about the nature of the assignment or transfer of rights to the trust can be cured by amendment. (See *Gill v. Hearst Pub. Co.* (1953) 40 Cal.2d 224, 228 [uncertainty or ambiguity in a pleading "is capable of being cured by amendment"].)

the assignor . . . and, where it is clearly the intent of the parties, as manifested by their conduct in the instant matter, the assignee succeeds to the obligations of the contract"]; *Walker v. Phillips* (1962) 205 Cal.App.2d 26, 32 ["[w]hether an assignee has assumed the obligations of the contract is to be determined by the intent of the parties and may be implied from acceptance of benefits under the contract"]; see also Civ. Code, § 1589.) Tucker's allegations regarding the relationship between The Florida Group and PNC may not be entirely accurate, but we assume they are true at this stage in the litigation.[2]

C. *Tucker Sufficiently Pleaded His Performance Under the Loan*

Subject to exceptions not relevant here, "[i]t is sufficient for a plaintiff to simply allege that he has 'duly performed all the conditions on his part.'" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1389; accord, *Adobe Systems Incorporated v. A & S Electronics, Inc.* (N.D.Cal. 2015) 153 F.Supp.3d 1136, 1146.)[3] That is what Tucker alleged,

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[2] Tucker, however, has not alleged or explained how he has any individual claims against PNC. It appears his only claims are as trustee of the Zula Tucker Living Trust, which he alleges is the successor to Zula Tucker's interest in the note.

[3] One of the exceptions is that "a general allegation of due performance will not suffice if the plaintiff also sets forth what has actually occurred and such specific facts do not constitute due performance." (*Careau & Co. v. Security Pacific Business Credit, Inc.*, *supra*, 222 Cal.App.3d at pp. 1389-1390.) PNC suggests Tucker alleged he is in default, which would be an admission of nonperformance. But that's not what Tucker alleged. He alleged

and on demurrer we must assume Tucker's allegation is true. (See *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1229 [on demurrer "the trial court was required to construe all factual allegations in the complaint in [the plaintiff's] favor"].) His allegation of performance was sufficient to survive demurrer.

Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, cited by PNC, is distinguishable. The nonperformance of the plaintiff in *Durell* was unexcused because he did not allege the amount he paid "remotely cover[ed] the reasonable value of [defendant's] services, even by his own estimation." (*Id.* at pp. 1368-1369.) In contrast, Tucker alleged he not only made the payments owed to PNC, but paid more than the amount owed.

D. *The Four-Year Statute of Limitations Bars Tucker's Breach of Contract Cause of Action, but He Can Amend To Seek Payments Within the Last Four Years*

Tucker alleged The Florida Group breached the promissory note by failing to credit all of the payments Zula Tucker made during 1988 to 1990. The four-year statute of limitations for breach of written contract in Code of Civil Procedure section 337, subdivision (1), bars this claim because it accrued on the dates Zula Tucker made the challenged payments in 1988 through 1990. (See *Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1341 [statute of limitations for breach of contract is "four years from the time the claim accrues," which is

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PNC breached the contract by wrongfully serving a notice of default; Tucker alleged he was not in default, and in fact, as stated, had overpaid.

“‘“‘when [it] is complete with all of its elements’–those elements being wrongdoing [or breach], harm, and causation”’”].) Tucker filed this action in September 2015, at least 25 years too late.[4]

Tucker attempts to avoid the bar of Code of Civil Procedure section 337, subdivision (1), by arguing the applicable statute of limitations is actually Code of Civil Procedure section 337, subdivision (2), which applies to “[a]n action to recover . . . upon a book account . . . consisting of one or more entries.” He contends the promissory note is “a book account, which required payment of the aggregate sum, not monthly installments.” And Code of Civil Procedure section 337, subdivision (2), provides the four-year statute of limitations does not begin to run until the “date of the last item.” (See *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 966 (*Lauron*) [“[a]ctions to recover on an account stated or a book account accrue on the date of the last item or entry in the account”]; *R.N.C. Inc. v. Tsegeletos* (1991) 231 Cal.App.3d 967, 971-972 [“the four-year period of limitations on a book account begins as of the last entry in the book account”].)

The promissory note is not an open book account. “A book account is defined as ‘a detailed statement, kept in a book, in the nature of debit and credit . . . .’” (*Wright v. Loaiza* (1918) 177 Cal. 605, 606-607.) It is “‘a detailed statement which constitutes the principal record of one or more transactions between a debtor and

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[4] Tucker does not argue the discovery rule applies to his breach of contract cause of action. (See *Eleanor Licensing LLC v. Classic Recreations LLC* (2018) 21 Cal.App.5th 599, 611, fn. 10; *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 73.)

a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner.' [Citation.] Examples of statements held to be book accounts include a law firm's billing statements reflecting work performed on an hourly basis [citation] and a ledger sheet recording amounts due for hay deliveries [citation]. A book account is 'open' where a balance remains due on the account." (*Lauron*, *supra*, 8 Cal.App.5th at p. 969.) "'An express contract, which defines the duties and liabilities of the parties, whether it be oral or written, is not, as a rule, an open account,'" unless the parties "agree to treat money due under an express contract, such as a lease, as items under an open book account." (*Ibid.*; see also *Richmond v. Frederick* (1953) 116 Cal.App.2d 541, 545 [an express contract will not preclude a finding an agreement is a book account if "the contract . . . was a mere framework necessarily contemplating the keeping of open accounts, and was not . . . the mere recording of transactions conducted under the terms of the contract"].)

Like a book account, the promissory note results in a series of payments over time. But because the monthly payments under the note, and the statements from the lender evidencing those payments, arise from a written contract, an action for the unpaid balance of the note is one for breach of contract, not an open book account. (See *Warda v. Schmidt* (1956) 146 Cal.App.2d 234, 237

["[t]he mere recording in a book of transactions or the incidental keeping of accounts under an express contract does not of itself create a book account"]; *Lee v. De Forest* (1937) 22 Cal.App.2d 351, 359 ["plaintiff's attempt to recover by alleging an open book account when his right of action is based upon the terms of an express contract, ought not to be allowed"].) Where, as here, the contract "*binds the debtor to pay a specified sum*" (*Lauron*, *supra*, 8 Cal.App.5th at p. 971, fn. 5), the plaintiff cannot avoid the statute of limitations governing breach of contract actions by alleging an open book account. (See *Leighton v. Forster* (2017) 8 Cal.App.5th 467, 494 ["[t]he incidental keeping of accounts pursuant to an antecedent contract cannot be used to 'extend the statute of limitations beyond the time it would [otherwise] run on the contractual obligation'"]; *Stewart v. Claudius* (1937) 19 Cal.App.2d 349, 352 ["where . . . the action is one to recover installments due under a written contract, the provisions of the contract are controlling as to the running of the statute"].) Tucker has not alleged he, The Florida Group, or PNC ever agreed to treat the promissory note as a book account. (See *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1395, fn. 9 ["[u]nder California law . . . moneys due under an express contract cannot be recovered in an action on an 'open book account' in the absence of a contrary agreement between the parties"].) Nor has he argued he can amend to make such an allegation. (See *The Inland Oversight Committee v. City of San Bernardino* (2018) 27 Cal.App.5th 771, 779 ["[w]hen a court sustains a demurrer without leave to amend, the plaintiff has the burden of proving how an amendment would cure the defect," and "[i]f the plaintiff does not demonstrate on appeal 'how he can amend his complaint, and how that

amendment will change the legal effect of his pleading,' we must presume the plaintiff has stated his allegations 'as strongly and as favorably as all the facts known to him would permit'"].)[5]

As Tucker argues in the alternative, however, he can under the continuous accrual doctrine seek to recover any overpayments or losses due to accounting errors by PNC within four years of the date he filed this action. "Under the continuous accrual theory, 'a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period. [Citation.]' [Citation.] The kinds of cases in which the continuous accrual theory have been applied . . . include a variety of instances in which the plaintiff asserted a right to, or challenged the assessment of, periodic payments under contract . . . ." (*Baxter v. State Teachers' Retirement System* (2017) 18 Cal.App.5th 340, 378-379; see *Abbott Laboratories v. Superior Court* (2018) 24 Cal.App.5th 1, 14, fn. 4 [under the continuous accrual doctrine, "a series of wrongs may be viewed as each triggering its own limitations period"]; *Gilkyson v. Disney Enterprises, Inc.*, *supra*, 244 Cal.App.4th at p.

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[5] *Tillson v. Peters* (1940) 41 Cal.App.2d 671, on which Tucker primarily relies, does not support his argument. The court in *Tillson* held the plaintiff could not "avoid the effect of the statute of limitations" by attempting to characterize rent payments due under an oral lease as an open book account. (*Id.* at p. 675.) The court stated that in "an action upon an oral contract the statute of limitations may not be extended from two to four years by the mere device of attempting to convert the cause into a suit based on an open book account." (*Id.* at p. 676.) The court also held the entries in the plaintiff's books did not constitute a book account. (*Id.* at p. 677.)

1341 ["[u]nder the continuous accrual doctrine each breach of a recurring obligation is independently actionable"].) Tucker, as trustee, is entitled to amend to "challenge all payments within the preceding four years."

DISPOSITION

The judgment is reversed and remanded with instructions for the trial court to vacate its order sustaining the demurrer by PNC without leave to amend and to enter a new order sustaining the demurrer with leave to amend to allow Tucker, as trustee, to allege, if he can, any breach of contract within four years of April 17, 2015, the date he filed this action. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.